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Sautre a/p Bhaskaran Pillay v Public Prosecutor

B HIGH COURT (MUAR) — CRIMINAL APPLICATION NO JB-44–11–09 OF 2021
AWANG ARMADAJAYA JC
7 OCTOBER 2021

C *Criminal Procedure — Bail — Refusal of — Applicant was charged under s 39B of the Dangerous Drugs Act 1952 ('DDA') and held under remand — Magistrates' court refused bail — Applicant applied for revision — Whether person charged under s 39B(1)(a) of the DDA may be granted bail pending transmission to High Court — Dangerous Drugs Act 1952 ss 39B & 41B*

D

Criminal Procedure — Revision — Criminal revision — Applicant was charged under s 39B of the Dangerous Drugs Act 1952 and held under remand — Magistrates' court refused bail — Applicant applied for revision — Whether E *High Court should exercise powers of revision under s 325 of Criminal Procedure Code*

The applicant was charged under s 39B of the Dangerous Drugs Act 1952 ('the DDA') and she was held under remand pending the transmission of the case to F the High Court. The magistrates' court had refused bail for the applicant, hence, the applicant filed the present application for revision ('the application') to set aside the remand order that was granted by the magistrate. The basis for the application was that the applicant was 63 years old, had a permanent address, and had clean records from any criminal conviction or arrest. The G issues for the court's consideration were: (a) whether a person charged under s 39B(1)(a) of the DDA may be granted bail pending transmission to the High Court; and (b) whether the High Court should exercise the powers of revision under s 325 of the Criminal Procedure Code ('the CPC') on the facts and circumstances of the case.

H

Held, dismissing the application, and affirming the order of magistrate in not granting bail:

(1) Section 41B(1) of the DDA stated that bail shall not be granted to an accused person charged with an offence under the DDA, where the I offence was punishable with imprisonment for more than five years and this sub-s (1) shall have effect notwithstanding any other written law or any rule of law to the contrary. Subsection (2) was the operational form of the maxim generalia specialibus non derogant. The Federal Court in the case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020]

6 MLJ 727 had recognised and reaffirmed the decision of the Federal Court in the case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 in applying s 41B(1) of the DDA. The court in the present case agreed with the reasoning of the Federal Court in the above cases and the court was also bound by the decision of the Federal Court (see paras 44–45, 57–58 & 71).

(2) It was well established law that the court would generally exercise its revisionary powers where the lower court failed to comply with the provisions of the law, the decision was grossly erroneous, the findings of fact were not supported by evidence, material evidence of the parties were not considered, there had been an error of law or procedure and where the revision was demanded in the public interest. The primary objective of a revision was to correct a miscarriage of justice which had affected the applicant and the High Court's powers of revision were to be exercised sparingly and judiciously. In the present application, the court had scrutinised the records of the magistrates' court and the court could not find anything in the remand order that was illegal, incorrect, or improper (see paras 64 & 70).

[Bahasa Malaysia summary

Pemohon didakwa di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') dan dia ditahan reman sementara menunggu pemindahan kes ke Mahkamah Tinggi. Mahkamah majistret telah menolak ikat jamin untuk pemohon, justeru, pemohon memfailkan permohonan semasa untuk semakan ('permohonan tersebut') untuk mengenepikan perintah reman yang telah diberikan oleh majistret. Asas bagi permohonan tersebut ialah pemohon berumur 63 tahun, mempunyai alamat tetap, dan mempunyai rekod bersih daripada apa-apa sabitan jenayah atau penahanan. Isu-isu untuk pertimbangan mahkamah adalah: (a) sama ada seseorang yang didakwa di bawah s 39B(1)(a) ADB boleh diberikan jaminan sementara menunggu pemindahan kes ke Mahkamah Tinggi; dan (b) sama ada Mahkamah Tinggi patut menggunakan kuasa semakan di bawah s 325 Kanun Tatacara Jenayah berdasarkan fakta dan keadaan kes.

Diputuskan, menolak permohonan tersebut dan mengesahkan perintah majistret dalam menolak permohonan ikat jamin:

(1) Seksyen 41B(1) ADB menyatakan bahawa ikat jamin tidak akan diberikan kepada tertuduh yang didakwa atas kesalahan di bawah ADB, di mana kesalahan tersebut boleh dihukum penjara selama lebih lima tahun dan sub-s (1) ini hendaklah berkuat kuasa tidak mengira apa-apa undang-undang bertulis lain atau apa-apa peraturan undang-undang lain yang menyatakan sebaliknya. Subseksyen (2) ialah bentuk operasi maxim generalia specialibus non derogant. Mahkamah Persekutuan dalam kes *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727

telah mengiktiraf dan mengesahkan semula keputusan Mahkamah Persekutuan dalam kes *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 dalam mengguna pakai s 41B(1) ADB. Mahkamah dalam kes ini bersetuju dengan alasan-alasan Mahkamah Persekutuan dalam kes-kes di atas dan mahkamah juga terikat dengan keputusan Mahkamah Persekutuan (lihat perenggan 44–45, 57–58 & 71).

(2) Adalah menjadi undang-undang yang mantap bahawa mahkamah secara amnya akan menggunakan kuasa penyemakannya di mana mahkamah rendah gagal mematuhi peruntukan undang-undang, keputusan tersebut adalah kekhilafan yang besar, dapatan-dapatan fakta tidak disokong oleh keterangan, keterangan material pihak-pihak tidak dipertimbangkan, terdapat kekhilafan undang-undang atau prosedur dan apabila semakan tersebut dimohon demi kepentingan awam. Objektif utama semakan adalah untuk membetulkan kegagalan keadilan yang telah menjejaskan pemohon dan kuasa semakan Mahkamah Tinggi hendaklah dilaksanakan dengan berhati-hati dan adil. Dalam permohonan ini, mahkamah telah meneliti rekod mahkamah majistret dan mahkamah tidak mendapati apa-apa dalam perintah reman yang menyalahi undang-undang, tidak betul atau tidak wajar (lihat perenggan 64 & 70).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)

Amber Memory Sdn Bhd v WFC Development Sdn Bhd [2020] MLJU 1978; [2020] 1 LNS 1694, HC (refd)

Che Su binti Daud v PP [1978] 2 MLJ 162 (refd)

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41; [2010] 1 CLJ 444, CA (refd)

Dorai Manickam Alias Davis v Rex [1936] 1 MLJ 209; [1936] 1 LNS 12 (refd)

Emperor v Nasrullah & Ors AIR 1928 All 287, HC (refd)

Gan Thing Phing v Ong Gek Kim (No 2) [1998] 7 MLJ 351; [1999] 7 CLJ 146, HC (refd)

Iris Koto (M) Sdn Bhd v Chong Sam Mooi & Anor [2019] MLJU 619; [2019] 1 LNS 914, HC (refd)

Kok Kon Sang (operating a business under the name and style of Eddie Kok & Co (formerly known as Kok & Co) Chartered Accountants, Malaysia) v Institut Akauntan Malaysia [2019] 11 MLJ 1; [2020] 1 CLJ 702, HC (refd)

Lee Wei Kok v PP [2020] MLJU 2233; [2020] 1 LNS 1995, HC (refd)

Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69; [1987] 1 CLJ 35; [1987] CLJ Rep 163, SC (refd)

Lim Liah Wee v PP [2021] 11 MLJ 494; [2021] 7 CLJ 448, HC (refd)

Loy Chin Hei v PP [1982] 1 MLJ 31; [1981] CLJ Rep 178 (refd)

Manickam & Ors v PP [1982] 1 MLJ 227; [1982] CLJ 162; [1982] CLJ Rep 552 (refd)
Mohamad bin Hassan & Ors v Dewan Bandaraya Kuala Lumpur & Anor [2001] 4 MLJ 423; [2001] 1 LNS 232, HC (refd)
Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 1 MLJ 645; [1995] 2 CLJ 209, CA (refd)
Muzammil Izat bin Hashim v PP [2003] 6 MLJ 590; [2009] 2 CLJ 354, HC (refd)
Newland Enterprise Pte Ltd v 'Santa Arona' (owners of) [1988] 2 MLJ 246; [1988] 2 CLJ Rep 40 (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim [1998] 4 MLJ 481; [1998] 4 CLJ 387; [1998] 4 AMR 3878, HC (refd)
PP v Sogas Trading [2020] 10 MLJ 258; [2020] 4 CLJ 410, HC (refd)
PP v Wee Swee Siang [1948] 1 MLJ 114; [1948] 1 LNS 49 (refd)
PP v Leong Ying Ming [1993] 1 MLJ 177; [1993] 2 CLJ 143, SC (refd)
State v P Sugathan 1988 CriLJ 1036, HC (refd)
Wong Leh Yin v PP [2007] 8 CLJ 438, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 31, 35
Criminal Procedure Code ss 2, 3, 51, 177A, 323, 325, 326, 387, 388, 389 First Schedule
Dangerous Drugs Act 1952 ss 39A(2), 39B, 39B(1), (2), (1)(a), 41, 41B, 41B(1), (2)
Penal Code ss 109, 364
Rules of Court 2012 O 92 r 1(4)

Sobini a/p Kobu (M Thanakumaran & Shan) for the appellant.
Mustaqim bin Sukarno (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an application for revision to set the order of the learned magistrate who refused bail for the applicant. The applicant was charged before the magistrates' court under s 39B of the Dangerous Drugs Act 1952 on 23 September 2021 and she is held under remand pending the transmission of the case to the High Court.

[2] Initially the learned counsel for the applicant filed a notice of motion pursuant to encl 1 for an order to revise the order of the learned magistrate. The affidavit in support (encl 2) was neither attested to nor affirmed by anyone. I

was made to understand that the reason given was that the Chief Justice Practice Direction No 8 of 2021 allowed such a practice.

[3] I have perused over the Chief Justice Practice Direction No 8 of 2021 and the relevant part is under Part B.

> *Penyempurnaan Afidavit Bagi Kes Perakuan Segera Atau Permohonan Segera*
>
> 7. Bagi apa-apa kes perakuan segera atau permohonan segera, *pihak-pihak bolehlah memfailkan affidavit yang belum disempurnakan dengan aku janji untuk menyempurnakan affidavit tersebut dalam tempoh empat belas (14) hari selepas —*
>
> (a) tamatnya tempoh PKP; atau
>
> (b) *apa-apa arahan yang dikeluarkan oleh Kerajaan yang membenarkan Perkhidmatan Kehakiman dan Perundangan untuk beroperasi dalam tempoh PKP*
>
> Translation:
>
> B. Perfection of Affidavit filed with Certificate of Urgency
>
> 7. For cases with a Certificate of Urgency*, parties may file affidavit that is incomplete with the undertaking that the said affidavit will be perfected within 14 days after:*
>
> (a) Movement Control Order expires; or
>
> (b) *any Directive issued by the Government that allows the Judicial and Legal Service to operate during the Movement Control Order*

[4] In my view, the exemption given was only for the period of Movement Control Order as issued by the government in the effort to control the spread of an illness (COVID-19) caused by a corona virus called SARS-CoV-2 virus or until the Judicial and Legal Service could operate during the Movement Control Order. As this is over in Muar, I don't think such exemption is in force in Muar. Further the exemption is only in respect of affirmation of the affidavit before a Commissioner of Oath. On the other hand, an unsigned affidavit is as good as a piece of blank piece of paper.

[5] This was also the view of Her Ladyship Justice See Mee Chun in *Amber Memory Sdn Bhd v WFC Development Sdn Bhd* [2020] MLJU 1978; [2020] 1 LNS 1694 where it was ruled that:

> [26] The Court was of the considered opinion that the affidavit in support in encl 3 was defective as it was not signed by the deponent. There being no affidavit to support the application, encl 1 can be dismissed in limine.

[6] In *Newland Enterprise Pte Ltd v 'Santa Arona' (owners of)* [1988] 2 MLJ 246; [1988] 2 CLJ Rep 40, His Lordship Justice Edgar Joseph Jr, had to deal with, the affidavit of Mr Yeoh had attached to it, as exh JAY 11, a copy of an

unauthenticated and unsigned affidavit of one Ewe Choong Lay, filed in respect of Admiralty in Rem No 9/84 at the High Court, Penang, which purported to set out the position of Messrs Darshan Singh & Co vis a vis the actual owners of the vessel Santa Arona and their Solicitors Messrs Chang & Vello, and His Lordship ruled that:

> Assuming, therefore, that the plaintiffs have not by conduct waived their right (if any) to take the point (see, for example, *Re Brocklebank, ex parte Brocklebank* [1877] 6 Ch D 358 and *Reynolds v Howell* [1873] LR 8 QB 394), *I am faced here with what appears to be a conflict of affidavit evidence; namely, on the one hand, an affidavit affirmed to by Mr. Darshan Singh, asserting that his firm had authority to represent the defendants in these proceedings and, on the other, the unauthenticated and unsigned copy of what purports to be the affidavit of Ewe Choong Lay suggesting otherwise.*
>
> ...
>
> *I would therefore hold that the copy of the purported affidavit is virtually worthless as evidence.* (Emphasis added.)

[7] Granted that *Newland Enterprise Pte Ltd v 'Santa Arona' (owners of)* was during the days long before COVID-19 appeared and there was no Chief Justice Practice Direction No 8 of 2021. The Practice Direction was only for exempting the perfecting of the affidavit which is having it affirmed or sworn before the commissioner of oath.

[8] This is an exception to the general rule that 'As only the unaffirmed copy of the affidavit of service was filed at the time the JID was sought and entered, it was as good as there being no affidavit filed. An unsworn or unaffirmed copy of an affidavit is not an affidavit properly so called' (see *Iris Koto (M) Sdn Bhd v Chong Sam Mooi & Anor* [2019] MLJU 619; [2019] 1 LNS 914).

[9] In *Mohamad bin Hassan & Ors v Dewan Bandaraya Kuala Lumpur & Anor* [2001] 4 MLJ 423; [2001] 1 LNS 232, the deponent simply did not sign the main affidavit in the national language.

[10] In *Kok Kon Sang (operating a business under the name and style of Eddie Kok & Co (formerly known as Kok & Co) Chartered Accountants, Malaysia) v Institut Akauntan Malaysia* [2019] 11 MLJ 1; [2020] 1 CLJ 702, no certificate of urgency was filed together with the signed and affirmed English affidavit thus O 92 r 1(4) was not applicable in considering whether to admit the unsigned and unaffirmed national language version of the affidavit.

[11] In *Gan Thing Phing v Ong Gek Kim (No 2)* [1998] 7 MLJ 351; [1999] 7 CLJ 146 the main affidavit in the national language was affirmed but signed in Chinese and the learned judge had doubts as to whether the deponent understood what he was signing.

[12] In *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444 the impugned document was a memorandum of appeal in English, not an affidavit. The Court of Appeal ruled that the absence of the memorandum of appeal in the National Language rendered the appellant's record of appeal incurably defective and consequently, the appellant's appeal must be dismissed as there was no proper record of appeal before the court.

[13] The learned counsel for the applicant later filed a letter to the court applying for a revision of the order of the learned magistrate. This in my view is the more appropriate mode because it requires no affidavit in support and hence the court fixed a date to hear parties. For the record under s 326 of the Criminal Procedure Code reads as follows:

> No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

[14] The above authorities underline the importance of signing (and affirming, where relevant) the affidavits and other document.

[15] Further there was no undertaking that an affirmed copy shall be filed. For the sake of completion since the Judicial and Legal Service was allowed to operate on 2 July 2021, the last date for any filing of incomplete or imperfect documents must be filed by 16 July 2021 and on 23 September 2021, it was way past that date.

[16] I decided that notwithstanding s 326, the appropriate course of action is to call upon both the learned counsel for the applicant as well as the learned deputy public prosecutor to submit on the issues raised.

BACKGROUND FACTS

[17] The applicant was arrested on 15 September 2021 at the Muar High Court when she came to visit her son is undergoing a criminal trial at the Muar High Court.

[18] She gave a packet to her son (who is under remand) through the Court Police. The police decided to check the packet and found some substance which was suspected to be dangerous drugs. She was arrested and has since, been under remand because the case is classified under s 39B(1) of the Dangerous Drugs Act 1952 and is pending full investigation. The learned magistrate granted the application for remand

[19] The applicant is currently detained at the Sultanah Fatimah Specialist Hospital in Muar for stage 4 COVID-19 infection but has since recovered. The learned counsel for the applicant moved this court to exercise its revisionary powers to set aside the remand order that was granted by the learned magistrate.

[20] The basis of the application was that the applicant is 63 years old, has a permanent address, of clean records from any criminal conviction or arrest.

THE ISSUES IN THIS APPLICATION FOR REVISION OF THE ORDER OF THE LEARNED MAGISTRATE IN DENYING BAIL TO THE APPLICANT

[21] There are two issues here which are:

(a) whether a person charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 may be granted bail pending transmission to the High Court; and

(b) hether the High Court should exercise the powers of revision under s 325 of the Criminal Procedure Code on the facts and circumstances of the case.

[22] I shall not deal with the issue of the use of notice of application to obtain bail as this was dealt with in sufficient details in *Lee Wei Kok v Public Prosecutor* [2020] MLJU 2233; [2020] 1 LNS 1995 and *Lim Liah Wee v Public Prosecutor* [2021] 11 MLJ 494; [2021] 7 CLJ 448.

Whether a person charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 may be granted bail pending transmission to the High Court

[23] It was submitted by the learned counsel for the applicant that the applicant is 63 years old, down with Stage 4, COVID-19 and she suffers from other illnesses such as kidney failure as well as diabetes and high blood pressure. The learned counsel further submitted that the case of *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162 where His Lordship Justice Gunn Chit Tuan was posed with the issue of granting bail for an accused charged under s 39B(1)(a) Dangerous Drugs Act 1952 and His Lordship ruled as follows:

> The matters for consideration in granting or refusing bail are set out in *Mallal's Criminal Procedure* (4th Ed) at p 551 and they are as follows:
>
> (1) *the nature and gravity of the offence charged;*
>
> (2) *the nature of the evidence in support of the charge;*
>
> (3) *whether there was or was not reasonable ground for believing the accused guilty of the offence;*
>
> (4) *the severity and degree of punishment which conviction might entail;*

(5) *the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;*

(6) *the danger of the offence being continued or repeated;*

(7) *the danger of the witnesses being tampered with;*

(8) *whether the accused, if released on bail, is likely to tamper with the prosecution evidence;*

(9) *whether the accused is likely to get up false evidence in support of the defence;*

(10) *the opportunity of the accused to prepare the defence;*

(11) *the character, means and standing of the accused;*

(12) *the long period of detention of the accused and probability of further period of delay.*

...

Having weighed all the above considerations and having given them their proper weight, I was of the view that the accused/applicant in this case should be released on bail. This should not be taken to suggest for a moment that I was prejudging the case against the accused/applicant. *As I have stated above, I had little evidence before me which was intended to be adduced at the trial and her guilt or innocence was therefore a matter for future determination by the trial Court. In a matter like the present one, whether release on bail be refused or allowed, there should be no ground to suggest that the case has been prejudged. The only case in which such an assumption could possibly be justified was where the accused/applicant has satisfied the Court that on the evidence already produced there was no possible case against her and such was not the case here.*

In the circumstances of this case, I therefore directed that the accused/applicant be admitted to bail of $5,000 with two sureties acceptable to the learned Senior Assistant Registrar. (Emphasis added.)

[24] Now, 'Bail' is defined in the *Cambridge English Dictionary* (Cambridge University Press 2020) as 'an amount of money that a person who has been accused of a crime pays to a law Court so that they can be released until their trial. The payment is a way of making certain that the person will return to Court for trial'.

[25] Under s 389 of the Criminal Procedure Code which reads:

The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

[26] The purpose is bail is to ensure that a person will attend proceedings in

court for the trial of his case until its final conclusion without fail. A

[27] If there is a surety (or a bailor as he is known in some jurisdictions), the burden is on the surety to ensure the attendance of the accused person throughout the duration of the trial and if convicted, may be extended to ensure that the ends of justice are met. Once the surety understands his duty and is willing to offer himself to the court as one, he is duty bound to ensure the attendance of the accused person. His failure to ensure the attendance of the accused person does not only make himself liable for legal proceedings against himself and/or the amount of money (either in cash or in its equivalent value in property accepted by court) is liable to be forfeited. B C

[28] If the surety finds the behaviour of the accused person erratic and is beyond his control, he may apply to court to have his place as surety be replaced by another who is acceptable to the court or the accused person left without a surety must execute a personal bond (if the court allows) or be remanded until the disposal of his case. D

[29] Under s 2 of the Criminal Procedure Code, it is defined 'bailable offence' means an offence shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force and 'non-bailable offence' means any other offence. E

[30] The First Schedule, Criminal Procedure Code provides for offences under the Penal Code. It also defines offences outside the Penal Code. F

[31] For offences that are punishable with death, or imprisonment for seven years, these are non-bailable offence.

[32] For offences that are punishable with imprisonment for three years and upwards, but less than seven years, these are non-bailable offences. G

[33] For offences that are punishable with imprisonment for less than three years, these are bailable offences. H

[34] For offences that are punishable with a fine only, these are bailable offences.

[35] Mr Mallick in his book *Bail: Law and Practice* (2nd Ed) at p 193: I

> But the fact that the accused is presumed to be innocent till the guilt is proved against him beyond all reasonable doubt is not a relevant consideration for grant of bail. Pre-trial detention in itself is not an evil, nor opposed to the basic presumption of innocence.

[36] Justice CS Nair in the case of *State v P Sugathan* 1988 CriLJ 1036 where he states that:

> In some quarters, a feeling seems to exist that the object of criminal law is to protect the rights of the accused and that the criminal justice system is envisioned as a sentinel of the rights of the accused. It is not so. The law is the sentinel of rights, of the society and of the individual. The rights of the criminal defendant will be as zealously guarded, as the cause of public justice. Pre-trial detention in itself is not an evil, nor opposed to the basic presumption of innocence. Pronouncements of the Supreme Court have recognised the importance of effective investigation, as much as the rights of the accused.

[37] In the case of *Public Prosecutor v Wee Swee Siang* [1948] 1 MLJ 114; [1948] 1 LNS 49 where His Lordship Justice Callow in refusing the accused's application for bail cited with approval nine of the 12 factors His Lordship had considered. These factors are not exhaustive and factors such as age, sex and state of health of the accused are relevant factors to be considered.

[38] The 12 factors His Lordship had considered when refusing the application for bail were as follows:

(a) the nature and the gravity of the offence charged;

(b) the nature of the evidence in support of the charge;

(c) whether there was or was not reasonable ground for believing the accused guilty of the offence;

(d) the severity and degree of punishment which conviction might entail;

(e) the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;

(f) the danger of the offence being committed or repeated;

(g) the danger of the witnesses being tampered with;

(h) whether the accused, if released on bail, is likely to tamper with the prosecution evidence;

(i) whether the accused is likely to get up false evidence in support of the defence;

(j) the opportunity of the accused to prepare the defence;

(k) the character, means and standing of the accused; and

(l) the long period of detention of the accused and probability of further period of delay.

[39] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [1998] 4 MLJ

481; [1998] 4 CLJ 387; [1998] 4 AMR 3878 where it was not shown by any material on record to the court that the accused was not receiving any medical treatment while in detention and neither did counsel said that the accused was not receiving the required treatment.

[40] In *Manickam & Ors v Public Prosecutor* [1982] 1 MLJ 227; [1982] CLJ 162; [1982] CLJ Rep 552 the High Court ruled,

> In cases where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, because of the seriousness of the offence charged no bail should be granted, unless the accused satisfies the High Court that there are exceptional and special grounds justifying the granting of bail. In such an event, the burden is on the accused.
>
> In other cases of lesser charges, bail should, in my opinion, normally be granted as a matter of course, unless the prosecution can satisfy the Court that in the interest justice bail should not be granted. In all cases (whether bailable or non-bailable) the High Court has the discretion to grant bail under ss 388 and 389 of the Criminal Procedure Code, but, as has often been said, that discretion must always be exercised judicially.

[41] In *Wong Leh Yin v Public Prosecutor* [2007] 8 CLJ 438, the applicant was arrested and upon the expiry of the remand tentatively charged before the magistrate's court for an offence under s 364 read with s 109 of the Penal Code. The application to admit the applicant to bail pending the requisite consent to prosecute was made under ss 388 and 389 of the Criminal Procedure Code. The deputy public prosecutor, in opposing the application, filed an affidavit affirmed by a police officer holding the rank of Inspector who was also the investigating officer in this case which contained reasonable grounds for believing that the applicant had been guilty of abetment in the commission of the offence of abduction. The applicant, however, argued that on the effect of s 177A of the Criminal Procedure Code to the instant application where the requisite consent of the public prosecutor had not been obtained, s 388 did not apply because the applicant could not be said to have been charged with any offence. It followed therefore that s 387 of the CPC applied and the applicant was entitled to bail as of right. The High Court held that:

> [2] The offence is by virtue of s 109 of the Penal Code punishable by death or imprisonment for a term, which may extend to twenty years plus whipping. The construction of s 364 of the Penal Code was such that the death penalty is the first option of punishment for an offender (see *Lim Guan Eng v Public Prosecutor* [1998] 3 CLJ 769). It is common ground that the offence is non-bailable and unarguably a very serious one. Hence, the application to admit the applicant to bail pending the requisite consent to prosecute is made under ss 388 and 389 of the Criminal Procedure Code. The statement of the law on this is set out in the judgment of Gunn Chit Tuan, J in *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162, an authority which has withstood the test of time:

A Though a judge has under sections 388 and of the Criminal Procedure Code (FMS Cap 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment ... What constitutes B exceptional and special reasons must necessarily depend on the facts of each case ... (at page 162)

[3] At this early stage the prosecution is neither expected nor required to adduce evidence sufficient to satisfy the standard of proof required to establish the guilt of the applicant at the trial. All that is needed, in my view, is some evidence that C supports a finding consistent with the operative words of sub-section (1) of s 388 of the Penal Code which are these: '... if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life'.

D **[42]** It was submitted by the learned deputy public prosecutor that s 388 of the Criminal Procedure Code cannot be relied upon in a case under s 39B(1)(a) of the Dangerous Drugs Act 1952 because there is a specific provision in the law to deal with cases under the Dangerous Drugs Act 1952.

E **[43]** Section 41B of the Dangerous Drugs Act 1952 stipulates

41B No bail to be granted in respect of certain offences

(1) *Bail shall not be granted to an accused person charged with an offence under this Act —*

F (a) *where the offence is punishable with death; or*

(b) *where the offence is punishable with imprisonment for more than five years; or*

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public G interest to grant bail to the accused person.

(2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

H **[44]** There are two points that needs be emphasised which are:

(a) bail shall not be granted to an accused person charged with an offence under this Act, where the offence is punishable with imprisonment for more than five years; and

I (b) sub-s (1) of s 41B shall have effect notwithstanding any other written law or any rule of law to the contrary.

[45] Subsection (2) is the operational form of the maxim 'Generalia Specialibus Non Derogant'.

[46] In *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177; [1993] 2 CLJ 143, The respondent was charged for an offence under s 39A(2) of the Dangerous Drugs Act 1952 (the Act). The respondent applied for bail which was refused by the sessions court judge, he being of the view that the offence was non-bailable under s 41B of the Act. The respondent made an application for bail to the Kuantan High Court pursuant to s 389 of the Criminal Procedure Code and the learned judge allowed his application and granted bail. The public prosecutor appealed. The Supreme Court held that:

> We have perused the notes of proceedings recorded in the Court below and note that unfortunately the Federal Court case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285 ; [1982] CLJ 354 was not brought to the learned Judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s 41B(1)(b) are clear and that the words 'punishable with imprisonment for more than five years' mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to s 39A(2), we consider that the words 'be punished with imprisonment for life or for a term which shall not be less than five years' are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, ii.e. five years and one day up to a maximum of imprisonment for life. That being so, an offence under s 39A(2) of the Act clearly comes within the ban imposed by s 41B(1)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned Judge should not have granted bail in this case.
>
> In the classical case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285 ; [1982] CLJ 354, where His Lordship, Chief Justice (Malaya) Raja Azlan Shah (as His Majesty then was) had to decide whether a pregnant woman charged for trafficking in drugs could and should be granted bail. This is what His Lordship said at p 119:
>
> > In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

[47] And at p 120, His Lordship had this to say:

> The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard.

[48] His Lordship Justice Wan Yahya in *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31; [1981] CLJ Rep 178 discussed s 41B of the Dangerous Drugs Act 1952. The accused was refused bail by the Sessions Court judge and he applied to the High Court for bail pending the disposal of the charge against him. The issues before the court were: (1) whether s 41 of the Dangerous Drug Act would make the offence non-bailable; and (2) whether the High Court was precluded from exercising its discretionary powers over bail:

> At the commencement of hearing before this Court his counsel, Mr Hilary D'Cruz, with his usual precision, laid down two points for consideration of appeal, as follows:
>
> (i) Whether s 41B of the Dangerous Drugs Act would make the offence non-bailable or preclude bail: and
>
> (ii) In either of these two events whether the High Court is precluded from exercising its discretionary powers over bail.
>
> Counsel first drew the subtle distinction between a non-bailable offence and an unbailable offence. He contends that non-bailable offences, as defined under 'bailable offence' in s 2 of the Criminal Procedure Code include all offences, including those outside the Code, should be either bailable or unbailable offences. Following this reasoning, counsel argued, the offence under s 6B(1)(a) of the Dangerous Drugs Ordinance would therefore fall under 'non-bailable offence.'
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> It is of particular interest to note that, although the Criminal Procedure Code makes a specific definition of 'bailable offence' the draftsman deliberately avoided the use of that term in s 387 of the Code and instead employs the words 'person other than a person accused of a non-bailable offence' as those entitled to be released in bail. It would seem that the intention of the legislature is not only to confine this right to bail to bailable cases of the Penal Code only but to extend it to offences against other statutes as well. This, at first sight, may lend some support to counsel's argument. I accept the view that where any statutory offence other than the Penal Code is silent or makes no provision as to bail, then the First Schedule to the Criminal Procedure Code will apply and the offences can be classified either as bailable or non-bailable according to the provisions of the Schedule. However, the provisions only apply to cases where the particular statute creating the offence is silent on the question of bail. In my view, if provision is made in a later legislation, then the later provision will prevail over the provisions of the Criminal Procedure Code. The Code is not enacted with the absolute purpose of laying down a singularly mandatory procedure for all criminal offences but is intended for application to offences in which no provision for procedure is laid down. This intention is clear from s 3 of the Criminal Procedure Code, which reads:
>
> > All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; *subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.*

A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the Court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons. The High Court, it would appear by s 394, has absolute power to grant bail. However this discretion is, as indicated earlier, only exercisable where no specific provision exists in the statute creating the offence. In our present case the provision for bail does exist. Section 41B has the effect of making the offence under the dangerous Drugs Act an absolutely unbailable offence.

Mr D'Cruz's next argument is that even if s 41B of the Dangerous Drugs ordinance has the effect of rendering the offence absolutely unbailable, the section was intended to restrict the discretionary power of bail by the Court having original jurisdiction only and in this case the Sessions Court and not the High Court. He made particular reference to the case of *Sulaiman bin Kadir v Public Prosecutor* [1976] 2 MLJ 37; [1975] 1 LNS 171, but I am unable to see how it could be of much assistance here. Perhaps counsel's intention is to illustrate from the orbiter of Harun J. at p. 38 to the effect that when a statute creates an offence it should also include provision for bail and that the power to grant bail should properly be conferred on the particular Court given jurisdiction to try it. Both points, to mind, do not suggest the confinement of such power to the trial Court only.

It has also been urged upon me to adopt the course taken in the case of the Che Su binti Daud v Public Prosecutor [1978] 2 MLJ 162, *where Gunn Chit Tuan J, apparently in exercise of the powers under s 38 and 389 of the Criminal Procedure Code, admitted to bail an accused person charged under s 39B(2) of the Dangerous Drugs Act, an offence punishable with death or life imprisonment. Judgment in CHE SU case was given barely 4 days after s 41B of the Dangerous Drugs Act came into effect. This and the obvious absence of reference to, or even any mention made of, s 41 by the learned judge in his judgment, points out strongly to the possibility that the matter was missed and was neither raised nor discussed by the parties before the learned judge. I am convinced that had the learned judge's attention been drawn to the provision of this newly enacted law, his decision would have been entirely different.*

I have had several occasions to look at s 41B of the Dangerous Drugs Act and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law' to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the Courts by an earlier general legislation, i.e., the Criminal Procedure Code. When an Act enacts something in general items and afterwards another Act on a particular subject introduces in express terms special restriction on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or

restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

The discretion as generally given by s 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the subordinate and High Courts, by s 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, both the Sub Dangerous Drugs Act. Disconcerting as it may be those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

The restriction on bail under s 41B of the Dangerous Drugs Act is absolute. Neither the Courts below, nor this Court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the Public Prosecutor certifies that it is against public interest to allow bail.

The application for bail is therefore refused.

[49] His Lordship paid special attention to s 3 of the Criminal Procedure Code that 'All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences'.

[50] In *Loy Chin Hei* after referring to *Che Su binti Daud* has this to say:

... it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law', to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail.

[51] Further down the page, His Lordship said:

Where an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

[52] His Lordship further said at p 33:

> The discretion as generally given by ss 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the Subordinate and High Courts, by s 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, especially those relating to the liberty of the subject who is Accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

[53] This court was also moved to adopt the stance of His Lordship Justice Gunn Chit Tuan in in the case of the *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162, where His Lordship apparently in exercise of the powers under ss 38 and 389 of the Criminal Procedure Code, admitted to bail an accused person charged under s 39B(2) of the Dangerous Drugs Act, an offence punishable with death or life imprisonment.

[54] The learned deputy in his reply informed the court that based on his research, the s 41B Dangerous Drugs Act 1952 was inserted by way of an Dangerous Drugs (Amendment) (No 2) Act 1975 Act A318 which received the Royal Assent on 22 August 1975 and came into force on 5 September 1975 and was *Gazetted* on 4 September 1975.

[55] His Lordship Justice Wan Yahya in *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31; [1981] CLJ Rep 178 commented that the judgment in *Che Su*'s case was given barely four days after s 41B of the Dangerous Drugs Act came into effect. This and the obvious absence of reference to, or even any mention made of, s 41 by the learned judge in his judgment, points out strongly to the possibility that the matter was missed and was neither raised nor discussed by the parties before the learned judge. I am convinced that had the learned judge's attention been drawn to the provision of this newly enacted law, his decision would have been entirely different.

[56] Apparently His Lordship Justice Gunn Chit Tuan when sitting in the Federal Court departed from His Lordship's earlier views and this may be seen in *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177; [1993] 2 CLJ 143 where the Federal Court ruled that, inter alia:

> We have perused the notes of proceedings recorded in the court below and note that unfortunately the Federal Court case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285 ; [1982] CLJ 354 was not brought to the learned judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s 41B(1)(b) are clear and that the words 'punishable with imprisonment for more than five years' mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to s 39A(2), we consider that the words 'be punished with

imprisonment for life or for a term which shall not be less than five years' are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, ie five years and one day up to a maximum of imprisonment for life. That being so, an offence under s 39A(2) of the Act clearly comes within the ban imposed by s 41B(1)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned judge should not have granted bail in this case.

[57] In the latest case from the Federal Court which is *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151 recognised and reaffirmed the decision in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 in the following words:

> [53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is via the maxim generalia specialibus non derogant. The second is the doctrine of harmonious construction.
>
> [54] *The former Federal Court had the occasion to consider the operation of the CPC and the DDA in Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119. *In Chew Siew Luan, the question was whether the provisions relating to bail in the CPC were applicable to a trafficking charge preferred under the DDA. The Federal Court unanimously held that the provisions of the DDA will apply to the exclusion of the CPC. This is what Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said:*
>
> > *Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act, 1967.*
>
> *The Dangerous Drugs Act 1952 (Revised — 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (A A426) and became operative on 10.3.1978. Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law …*
>
> *It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and*

expressions used in a legislative measure must take their colour from the context in which they appear … The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the provisions of section 41B(1)(c) of the Dangerous Drugs Act … (Emphasis added.)

[58] I believe that we all know that this court being a High Court cannot overrule the Federal Court. Apart from the fact that I fully agree with the reasoning of their Lordships, the Federal Court's judgment binds this court as well.

Whether the High Court should exercise the powers of revision under s 325 of the Criminal Procedure Code on the facts and circumstances of the case

[59] The powers of revision by the High Court are found in s 31 of the Courts of Judicature Act 1964 and s 325 of the Criminal Procedure Code:

Courts of Judicature Act 1964:

31. Revision of criminal proceedings of subordinate courts *The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.*

Criminal Procedure Code:

325. Powers of Judge on revision

(1) *A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.*

(2) *No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.*

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[60] The provision of the law that explains this is s 323 which reads as follows: 'A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court'.

[61] The High Court's power of revision clearly spelled out in ss 31 and 35 Courts of Judicature Act 1964 and ss 323 and 325 Criminal Procedure Code. I am reminded that in a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered, only in very exceptional circumstances, to prevent a miscarriage of justice and confined myself to errors of law and procedure only.

[62] Hence to exercise this vast powers, the principles of law are enumerated as follows:

(a) powers exercised by the High Court over the Subordinate Courts exercising criminal jurisdiction.

(b) the purpose of satisfying itself as to the

(i) correctness; or

(ii) legality; or

(iii) propriety,

of any finding, sentence or order recorded or passed by the Subordinate Criminal Court

or

(c) the regularity of any proceedings of that subordinate court.

[63] In the case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35; [1987] CLJ Rep 163, the Supreme Court discussed at length the powers of revision exercisable by the High Court. On the object of revision, it quoted the Indian case of *Emperor v Nasrullah & Ors* AIR 1928 All 287 which says that the object of revisionary powers is:

> ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.

[64] It is well established law that the court will generally exercise its revisionary powers where the lower court fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public interest. The primary objective of a revision is to correct a miscarriage of justice which has affected the applicant and the High Court's powers of revision are to be exercised sparingly and judiciously (see *Public Prosecutor v Sogas Trading* [2020] 10 MLJ 258; [2020] 4 CLJ 410).

[65] The application for revision must be done at the first possible moment and not after other methods of procedure have been unsuccessfully adopted (*Dorai Manickam Alias Davis v Rex* [1936] 1 MLJ 209; [1936] 1 LNS 12). A

[66] In *Dorai Manickam*'s case, where an applicant has had the opportunity to appeal but neglects to do so, the court should not exercise its powers of revision unless there are very good reasons for that neglect. B

[67] It is not desirable or possible to lay down hard and fast rules as to when this court will or will not exercise its powers of revision under s 312A of the Code. Each case must be decided according to its own circumstances. It may, however, be laid down as a broad and general rule that where a party to criminal proceedings has had the opportunity to appeal under s 293 or s 295 of the Code but neglects, without very good reasons, so to do he will not be allowed to invoke the provisions of s 312A and, moreover, that where it is proper that application be made to the court to exercise its powers under that section the application should be made at the first possible moment and not merely as a forlorn hope after other methods of procedure have been unsuccessfully adopted (see *Public Prosecutor v Sogas Trading* [2020] 10 MLJ 258; [2020] 4 CLJ 410). C D E

[68] The decision in *Dorai Manickam* was quoted with approval by the Court of Appeal in *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645; [1995] 2 CLJ 209 where His Lordship Justice Gopal Sri Ram (for the Court of Appeal) said: F

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam Alias Davis v Rex* [1936] 1 MLJ 209; [1936] 1 LNS 12. G

[69] Later, in the case of *Muzammil Izat bin Hashim v Public Prosecutor* [2003] 6 MLJ 590; [2009] 2 CLJ 354 the same court had occasion to consider the issue of whether the appellant can seek the revisionary powers of the High Court when the appellant failed to appeal against an order made by the sessions court under s 51 of the Criminal Procedure Code. In dismissing the appeal His Lordship Justice Hasan Lah (for the Court of Appeal) stated the following: H

> [8] In his judgment the learned High Court judge referred to and relied on the decision of the Supreme Court in *Public Prosecutor v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436; [1985] CLJ Rep 260 where it was held inter alia that a decision or order made under s 51 of the Code is a final order in the sense that it is final in its effect and therefore appealable under s 307 of the Code. The other case referred to by the learned High Court judge in his judgment is *Dorai Manickam* I

Alias Davis v Rex [1936] 1 MLJ 209; [1936] 1 LNS 12 where it was held that where a party to criminal proceedings who has had the opportunity to appeal neglects, without very good reasons, so to do, he will not be allowed to call in aid the High Court's revisionary powers.

...

[12] Learned counsel for the appellant also submitted that the principle of law stated in Dorai Manickam's case is a bad law because the High Court is conferred with extensive powers of revision in criminal proceedings under s 323 of the Code and s 35 of the Courts of Judicature Act 1964 and alternatively he submitted that *Dorai Manickam*'s case does not set out that principle of law at all. We found no merit in that argument. Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable and no appeal has been lodged. In *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645; [1995] 2 CLJ 209 at p 219 Gopal Sri Ram JCA said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged. *Dorai Manickam Alias Davis v Rex* [1936] 1 MLJ 209; [1936] 1 LNS 12.

[70] I have scrutinised the records of the magistrates court and I could not find anything in the remand order that is either illegal, or incorrect or improper.

CONCLUSION

[71] Having read the cause papers, the written submissions and heard all parties, I have given the application my most earnest consideration. I could not find fault in the decision of the learned magistrate and I am bound by the Federal Court in the authorities I cited above.

[72] The application for revision, I regret to say could not be acceded to. The order of the learned magistrate in not granting bail is hereby affirmed.

[73] The decision that I am making is only in respect of the bail application or the application for a revision of the order of the learned magistrate in refusing bail and does not influence me in my evaluation of evidence or the trial or any matter arising therewith.

Application dismissed; order of magistrate in not granting bail affirmed.

Reported by Dzulqarnain Ab Fatar